

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 N. 5th STREET
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:

HAROLD MUSCHAMP

ADAMS COUNTY, IOWA

Respondent,

Proceedings under Section 309(g) of the
Clean Water Act, 33 U.S.C. § 1319(g)

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) Docket No. CWA-07-2008-0045
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) CONSENT AGREEMENT AND
) FINAL ORDER
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CONSENT AGREEMENT AND FINAL ORDER

The United States Environmental Protection Agency, Region 7 (EPA) and Harold Muschamp (Respondent) have agreed to settle this action before EPA files a complaint. Thus this action is simultaneously commenced and concluded pursuant to Rules 22.13(b) and 22.18(b)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 40 C.F.R. Part 22 (Consolidated Rules).

This Consent Agreement and Final Order (CA/FO) completely and finally settles all civil and administrative penalty claims and causes of action set forth below for Respondent's alleged discharges of pollutants into the West Fork of the One Hundred and Two River and its tributary which are waters of the United States (U.S.) located in Adams County, Iowa.

ALLEGATIONS

Jurisdictional Allegations

1. This is an administrative action for the assessment of civil penalties instituted pursuant to Section 309(g)(2)(B) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(2)(B), and in accordance with the Consolidated Rules.

2. This CA/FO serves as notice that EPA has reason to believe that Respondent has violated Section 301 of the CWA, 33 U.S.C. § 1311, by discharging pollutants from a concentrated animal feeding operation (CAFO) into the navigable waters of the U.S. without obtaining the necessary permit(s) required by Section 402 of the CWA, 33 U.S.C. § 1342.

Statutory and Regulatory Framework

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants, except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (NPDES) permit.

4. The CWA prohibits the unpermitted discharge of “pollutants” by any “person” from a “point source” into a “navigable water” of the U.S., as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

5. “Pollutant” is defined by Section 502(6) of the CWA, 33 U.S.C. § 1362 to include, *inter alia*, biological materials and agricultural waste discharged to water.

6. “Point source” is defined by Section 502(14) of the CWA, 33 U.S.C. § 1362 to include “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation . . . from which pollutants are or may be discharged.”

7. “Animal feeding operation” or “AFO” is defined by 40 C.F.R. § 122.23(b)(1) as a lot or facility where animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any twelve month period, and where crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility. The Federal Register preamble to 40 C.F.R. § 122 states that incidental vegetation in a clear area of confinement, such as a feedlot or pen, does not exclude an operation from meeting the definition of an AFO. The preamble also states that the absence of vegetation criterion is evaluated when the animals are confined and, therefore, the use of the lot or facility to grow crops or vegetation when animals are not confined does not exclude the facility from meeting the definition of an AFO.

8. According to 40 C.F.R. § 122.23(b)(2) a “concentrated animal feeding operation” (CAFO) is an AFO that meets the definition of either a Large CAFO or Medium CAFO under 40 C.F.R. § 122.23(b)(4) or 40 C.F.R. § 122.23(b)(6).

9. “Large CAFO” is defined by 40 C.F.R. § 122.23(b)(4)(iii) as an AFO where at least “1,000 cattle other than mature dairy cows or veal calves” are stabled or confined.

10. “Waters of the U.S.” are defined in 40 C.F.R. § 122.2 to include interstate rivers and streams, and tributaries thereto.

11. The Iowa Department of Natural Resources (“IDNR”) is the agency within the State of Iowa with the delegated authority to administer the federal NPDES Program. The EPA maintains concurrent enforcement authority with delegated state NPDES programs for violations of the CWA.

12. Section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes the EPA to commence an action for administrative penalties against any person who violates Section 301, 33 U.S.C. § 1311.

Factual Allegations

13. Respondent owns and operates an AFO that is located in Section 22 of Township 71 North, Range 34 West in Adams County, Iowa.

14. The Facility confines and feeds or maintains cattle for a total of 45 days or more in any twelve-month period.

15. Neither crops, vegetation, nor forage growth were sustained over any portion of the Facility’s feeding areas while cattle were present. The presence of any post-harvest residues or other vegetation while the cattle were confined was incidental.

16. The Facility is an AFO as defined by 40 C.F.R. § 122.23(b)(1), and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

17. On or about April 18, 2006, EPA inspectors attempted to conduct a compliance evaluation inspection of the Facility. EPA was unable to conduct the compliance evaluation inspection because neither Respondent nor his representatives were present at the Facility. However, on April 18, 2006, the inspectors made observations of the Facility from public roadways. On or about April 20, 2006, by telephone, an EPA inspector discussed the layout and operations at the Facility with the Respondent. EPA issued a CWA Section 308 information request, 33 U.S.C. § 1318, to the Respondent on or about March 28, 2007, that sought inventory records that demonstrated the number of cattle confined at the Facility. Respondent responded to the information request on April 9, 2007.

18. Based on information provided by Respondent, from approximately October through March annually from 2004 to 2007, Respondent confined greater than 1,000 head of cattle at the Facility; therefore the Facility is a large CAFO as that term is defined in 40 C.F.R. § 122.23(b)(4).

19. Respondent does not have a NPDES permit to operate the Facility and did not have a NPDES Permit at any time pertinent to this CA/FO.

20. Runoff from Respondent's feeding area flows directly into an unnamed tributary of the West Fork of the One Hundred and Two River. From this point it flows west northwest for 0.75 miles until it reaches the West Fork of the One Hundred and Two River.

21. The West Fork of the One Hundred and Two River and its tributary are waters of the U.S., as defined by 40 C.F.R. Part 122.2.

22. The Facility did not have adequate livestock waste control facilities to prevent the discharge of animal waste to the West Fork of the One Hundred and Two River and its tributary.

23. Based on the number of cattle confined at the Facility, the distance from the Facility to the West Fork of the One Hundred and Two River, and the slope and condition of the land across that distance, wastewater containing pollutants from open feeding areas at the Facility will flow into the West Fork of the One Hundred and Two River and its tributary.

24. Respondent had a duty to obtain a NPDES permit for the Facility.

25. At times the flow of wastewater from Respondent's Facility to the West Fork of the One Hundred and Two River constituted unauthorized discharges of pollutants from a point source to waters of the U.S.. This is a violation of Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and implementing regulations. Furthermore, Respondent's failure to obtain a NPDES permit for the facility is also a violation of Sections 308 and 402 of the CWA. 33 U.S.C. §§ 1318 and 1342.

Alleged Violations

26. The allegations set forth in paragraphs 1 through 25 are incorporated herein.

27. Respondent is a person as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362.

28. The Facility is a "concentrated animal feeding operation" as defined by 40 C.F.R. § 122.23(b)(4)(iii), and as that phrase is used in Section 502(14) of the CWA, 33 U.S.C. § 1362(14). As a result, the Facility is a "point source" within the meaning of Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

29. The number of cattle confined and fed at the Facility were above the threshold defined in 40 C.F.R. § 122.23(b)(4)(iii) for Large CAFOs.

30. The West Fork of the One Hundred and Two River and its unnamed tributary are waters of the U.S., as defined by 40 C.F.R. Part 122.2.

31. Wastewater runoff, which was discharged from the Facility into the West Fork of the One Hundred and Two River and its tributary during and after precipitation events, contained "pollutants" within the meaning of Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

32. Respondent's Facility discharged wastewater into the West Fork of the One Hundred and Two River and its tributary. Respondent's discharges constitute unauthorized discharges of pollutants from a point source to waters of the U.S.. This, coupled with Respondent not having an NPDES permit resulted in violations of Sections 301, 308 and 402 of the CWA, 33 U.S.C. §1311 and 1342, and implementing regulation.

CONSENT AGREEMENT

33. Respondent admits the jurisdictional allegations in this CA/FO and agrees not to contest EPA's jurisdiction in this proceeding or any subsequent proceeding to enforce the terms of the CA/FO.

34. Respondent neither admits nor denies the factual allegations contained in this CA/FO.

35. Respondent waives any right to contest the allegations as well as its right to appeal the proposed Final Order accompanying this Consent Agreement.

36. Respondent and Complainant each agree to bear their own costs and attorney's fees.

37. Nothing contained in the CA/FO shall alter or otherwise affect Respondent's obligation to comply with all applicable federal, state, and local environmental statutes and regulations and applicable permits.

38. Respondent consents to the issuance of the Final Order and consents to the payment of a civil penalty of Thirty Thousand One Hundred dollars (\$30,100) within thirty (30) days of the Effective Date of this Consent Agreement.

39. Payment of the penalty shall be by cashier or certified check made payable to "United States Treasury." The check must include the docket number and the name of the case. The check must be remitted to:

US Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, MO 63197-9000

Copies of the transmittal letter and the check shall simultaneously be sent to:

Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 7
901 N. 5th Street
Kansas City, Kansas 66101;

and

J. Daniel Breedlove
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency - Region 7
901 N. 5th Street
Kansas City, Kansas 66101.

40. Respondent's failure to pay any portion of the civil penalty in accordance with the provisions of this CA/FO may result in commencement of a civil action in Federal District Court to recover the total penalty, together with interest thereon at the applicable statutory rate.

41. This CA/FO disposes of all civil and administrative penalty claims for all the CWA violations identified herein.

42. Respondent certifies by the signing of this CA/FO that it is in compliance with the requirements of Sections 301, 308, and 402 of the CWA, 33 U.S.C. §§ 1311, 1318, and 1342. The effect of the settlement described in paragraph 41 above is conditioned upon the accuracy of this certification.

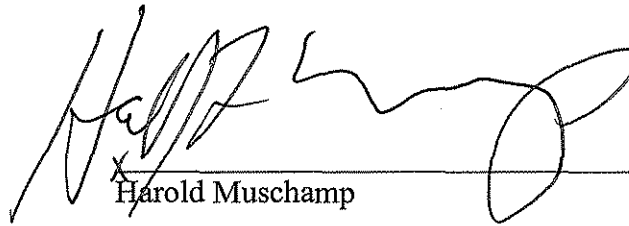
43. The EPA reserves the right to take any enforcement action with respect to any other violations of the CWA or any other applicable law and to enforce the terms and conditions of this CA/FO. Respondent reserves the right to defend against such actions on any basis in law or fact.

44. The undersigned representative of the Respondent certifies that he/she is fully authorized to enter the terms and conditions of this CA/FO and to execute and legally bind Respondent to it.

45. This Final Order shall be entered and become effective only after the conclusion of the period of public notice and comment required pursuant to Section 309(g)(4), 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45. The effective date shall be the date it is signed by the Regional Judicial Officer.

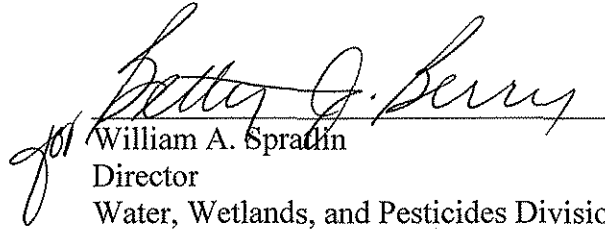
For the Respondent:

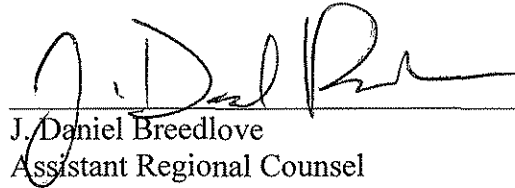
2-27-2008
Date


x
Harold Muschamp

For the United States Environmental Protection Agency - Region 7

05/07/08
Date


for William A. Spratin
Director
Water, Wetlands, and Pesticides Division


J. Daniel Breedlove
Assistant Regional Counsel

FINAL ORDER

The foregoing Consent Agreement is hereby approved and incorporated by reference into this Final Order. The Respondent is ordered to comply with the terms of the above Consent Agreement, effective immediately.

IT IS SO ORDERED.



ROBERT L. PATRICK
Regional Judicial Officer
U.S. Environmental Protection Agency
Region VII

Date: May 13, 2008

IN THE MATTER OF Harold Muschamp, Respondent
Docket No. CWA-07-2008-0045

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Consent Agreement and Final Order was sent this day in the following manner to the addressees:


Copy hand delivered to
Attorney for Complainant:

J. Daniel Breedlove
Assistant Regional Counsel
Region VII
United States Environmental Protection Agency
901 N. 5th Street
Kansas City, Kansas 66101

Original by Certified Mail Return Receipt to:

Eldon L. McAfee, Esquire
Bevcing, Swanson & Forrest, PC
321 E. Walnut, Suite 200
Des Moines, Iowa 50309

Dated: 5/13/08


Kathy Robinson
Hearing Clerk, Region 7